

PUBLIC VERSION

**Before the
Federal Communications Commission
Washington, DC 20554**

FCC 15M-23

In the Matter of)	MB Docket No. 12-222
)	
Game Show Network, LLC,)	File No. CSR-8529-P
Complainant,)	
)	
v.)	
)	
Cablevision Systems Corp.)	
Defendant.)	
)	
Program Carriage Complaint)	

MEMORANDUM OPINION AND ORDER

Issued: June 18, 2015

Released: June 19, 2015

PRELIMINARY STATEMENT

1. This is a ruling¹ on a motion for summary decision filed by Cablevision Systems Corporation (“Cablevision”) on April 29, 2015 (“Motion”). An opposition to the motion was filed by Game Show Network, LLC (“GSN”) on May 13, 2015 (“Opposition”); and, the Enforcement Bureau filed comments opposing the motion on May 27, 2015 (“Comments”). Upon consideration of the arguments made by the parties, as well as relevant legal authorities and the record of factual issues in this case, the motion for summary decision is denied.

BACKGROUND

2. Effective February 1, 2011, Cablevision repositioned GSN from a basic tier to a premium sports tier in New York, New Jersey, and Connecticut.² On October 12, 2011, GSN filed the above-captioned program carriage complaint³ alleging that Cablevision’s conduct discriminated against GSN on the basis of affiliation with the effect of unreasonably restraining GSN’s ability to compete fairly, in violation of Section 616(a)(3) of the Communications Act of 1934, as amended, and Section 76.1301(c) of the Commission’s Rules.⁴

¹ This ruling takes care to avoid disclosure of information or facts that have been designated confidential by any party.

² It remains to be determined whether the three states constitute an appropriate regional market for Cablevision’s programming. That analysis would include proof of Cablevision’s market power. These are material issues of fact on which the parties differ.

³ Game Show Network, LLC, Program Carriage Complaint, File No. CSR-8529-P (filed Oct. 12, 2011).

⁴ 47 U.S.C. § 536(a)(3); 47 C.F.R. § 76.1301(c).

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3. On May 9, 2012, the Media Bureau designated GSN's complaint for a hearing to determine: (1) "whether Cablevision has engaged in conduct the effect of which is to unreasonably restrain the ability of GSN to compete fairly by discriminating in video programming distribution on the basis of GSN's affiliation or non-affiliation in the selection, terms, or conditions for carriage of video programming provided by GSN, in violation of Section 616(a)(3) of the Act and/or Section 76.130(c) of the Commission's Rules," and if so, (2) "whether Cablevision should be required to carry GSN on its cable system on a specific tier or to a specific number or percentage of Cablevision subscribers and, if so, the price, terms, and conditions thereof; and/or whether Cablevision should be required to implement such other carriage-related remedial measures as are deemed appropriate,"⁵ and (3) "whether an Order for Forfeiture shall be issued against Cablevision for each willful and/or repeated violation."⁶ The hearing on GSN's complaint is scheduled to commence on July 7, 2015.

MOTION FOR SUMMARY DECISION

4. In its summary decision motion, Cablevision asserts that, in order to prevail on a program carriage complaint, "GSN must prove by a preponderance of the evidence both that Cablevision discriminated on the basis of affiliation and that such discrimination unreasonably restrained GSN's ability to compete fairly."⁷ Cablevision contends, however, that "the Presiding Judge should enter a summary decision dismissing GSN's carriage complaint now on unreasonable restraint grounds, rather than using the Commission's limited resources to conduct a trial that cannot, as a matter of law, result in a finding that Cablevision has violated Section 616."⁸ In sum, Cablevision argues that a hearing on the designated issues is unnecessary because, to the extent GSN were to prove discrimination on the basis of affiliation or non-affiliation, "Cablevision's size, coupled with the broad distribution that GSN enjoys in th[e] national market, means that Cablevision's carriage decision cannot, as a matter of law, unreasonably restrain GSN's ability to compete as a national network."⁹ In opposition to the motion, GSN disagrees with Cablevision that the relevant market is "national" and asserts instead—as does the Enforcement Bureau¹⁰—that the "key question is whether GSN is able to compete fairly within Cablevision's local coverage area."¹¹ But "even if the Presiding Judge were to look to national harm as Cablevision erroneously urges, triable questions exist about the

⁵ *Game Show Network, LLC v. Cablevision Systems Corp.*, Hearing Designation Order and Notice of Opportunity for Hearing for Forfeiture, 27 FCC Rcd 5113, 5136-37 ¶ 39 (MB 2012) ("HDO").

⁶ *Id.* at 5137-38 ¶ 44.

⁷ Motion at 11 (citing *Comcast Cable Commc'ns, LLC v. FCC*, 717 F.3d 982, 983 (D.C. Cir. 2013) ("*Tennis Channel*").

⁸ *Id.* at 3.

⁹ Motion at 17; *see also id.* at 2 ("the relevant inquiry under Section 616 for a national network like GSN is whether it has been unreasonably restrained from competing fairly in the national marketplace in which it operates").

¹⁰ Comments at 4-5 & 6 ("Cablevision's Motion misstates the standard by which its alleged discrimination of GSN should be judged." & "Moreover, neither the D.C. Circuit Court's majority opinion in *Tennis Channel* nor the Commission's program carriage rules (nor other precedent interpreting those rules) requires GSN to demonstrate that Cablevision has **national** market power in order to establish a violation of Section 616 of the Act.").

¹¹ Opposition at 6.

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magnitude of harm GSN suffered”¹²—as well as the magnitude of harm suffered in the tri-states market which GSN alleges is the correct geographic market to measure.¹³

DISCUSSION

5. Under Section 1.251 of the Commission’s Rules, the Presiding Judge “may grant a motion for summary decision to the extent that the pleadings, affidavits, materials obtained by discovery or otherwise, admissions, or matters officially noticed, show that there is no genuine issue as to any material fact and that a party is otherwise entitled to summary decision.”¹⁴ “In determining whether there is a genuine issue as to any material fact, the burden is on the moving party to establish that there is not the slightest doubt as to the facts and that only the legal conclusion remains to be resolved.”¹⁵ This means that the burden of proof which GSN otherwise would have in a full trial on the merits does not apply to Cablevision’s motion to summarily dispose of such issues; instead, Cablevision bears the burden.

6. In considering whether to grant or deny a motion for summary decision, the “moving party’s papers should be carefully scrutinized, while the opposing party’s papers, if any, should be treated with considerable indulgence.”¹⁶ And particularly with the carriage discrimination issue, the Presiding Judge “should give due weight to the need for cross-examination (which is unavailable to test affidavit evidence), to the general desirability of demeanor testimony, to the opposing party’s access to proof, and to the desirability of full exploration at an evidentiary hearing.”¹⁷ Moreover, the Presiding Judge “has broad authority to go forward with a hearing, regardless of the showing made, if the nature of the proceeding and of circumstances surrounding the request persuade him that a hearing is desirable.”¹⁸

7. Another burden of Cablevision’s is the need to address the correct inferences to draw from any uncontested facts and their effects. Summary decision is never appropriate “where the disputed issue involves the evaluation of conceded facts in terms of legal or policy consequences.”¹⁹ Yet even for the purpose of its summary decision motion, Cablevision does not concede any material fact in the record that would support a finding that it discriminated against GSN on the basis of affiliation (or non-affiliation) but asserts instead that “Cablevision is confident that, if this case goes to trial, the Presiding Judge will hold that GSN, ‘the network for games,’ is not similarly situated to [REDACTED] under any of the relevant metrics the Commission has identified,” and so, according to Cablevision, “GSN will be unable to prove that Cablevision made its carriage decision with any

¹² *Id.* at 1; *see also id.* at 12 (“Triable issues of fact remain as to the magnitude of harm GSN has suffered within the national market for video programming distribution.”).

¹³ *See id.* at 10-12.

¹⁴ 47 C.F.R. § 1.251(d).

¹⁵ *Midwest St. Louis, Inc.*, 79 FCC 2d 519, 52 ¶ 24 (1980) (internal quotation marks and citation omitted). *See also Summary Decision Procedures*, 34 FCC 2d 485, 488 ¶ 6 (1972) (“The party moving for summary decision has the burden of establishing through a written record that no triable issue exists; and he has this burden even with respect to issues upon which the opposing party would have the burden at the hearing.”).

¹⁶ *Summary Decision*, 34 FCC 2d at 488 ¶ 6.

¹⁷ *Id.*

¹⁸ *Id.* at 487 ¶ 5.

¹⁹ *See id.* at 488 ¶ 6.

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discriminatory intent.”²⁰ But that proffer must be fully tested with opposing fact and expert witnesses, confrontation with contradictory facts and conclusions, cross examination, and opposing economic analysis.

8. As is evident in the parties’ motion papers, the yet-to-be-proven absence of an unreasonable restraint issue on which Cablevision bases its request for summary decision includes vigorously contested issues of mixed fact and law. For instance, Cablevision argues that “[a] trial is not necessary because the undisputed facts demonstrate not just that GSN could compete fairly after Cablevision’s retiering, but that it has enjoyed [REDACTED] [REDACTED].”²¹ Yet, as the Opposition makes clear, material “issues of fact remain as to the magnitude of harm GSN has suffered within the national market for video programming.”²² Resolution of such factual issues in an evidentiary hearing, in which the Presiding Judge “will be able to fully weigh all evidence offered by the parties,”²³ is necessary to determine “whether Cablevision has in engaged in conduct the effect of which is to unreasonably restrain the ability of GSN to compete fairly.”²⁴ In making this determination, regardless whether the relevant market is “national”—as Cablevision argues—or “local”—as GSN, as well as the Enforcement Bureau, argues, Cablevision has not presented a purely legal question to be resolved. For example, if after discovery, Cablevision can show a profit for GSN from the unfavored tier on which GSN reaches a smaller percentage of subscribers, how would the comparative profits be for both parties on both tiers, taking into account a licensing fee that Cablevision pays to GSN, which can always be negotiated? Shouldn’t all that evidence be considered? Won’t it require considerable fact and economic presentation, analysis, and determination? And even on the chance that some facts may not be disputed, the inferences to be drawn from those facts—which may include economic facts drawn from data in reaching ultimate findings of fact—would still require an evidentiary hearing.²⁵ In this type of carrier case where opposing economic evaluations of the moving party’s conduct are to be formulated and presented by economic experts, and where the economic conclusions drawn are to be presented by these same opposing experts after cross examination by informed counsel, an evidentiary hearing is essential to assist the trier of fact in resolving the conflicts in expert opinions.

²⁰ Motion at 3. Although Cablevision argues that GSN must prove “both that Cablevision discriminated on the basis of affiliation and that such discrimination unreasonably restrained GSN’s ability to compete fairly,” *id.* at 11, its summary decision motion contains no argument regarding the affiliation/non-affiliation discrimination issue. *See also* Comments at 9 (“the Bureau would have expected Cablevision’s Motion to have argued, at a minimum, that the facts were undisputed that the programming of Cablevision’s affiliated networks, . . . , is not ‘similarly situated’ to that of GSN; that GSN was not harmed in its ability to compete; and that Cablevision would not have benefitted from a decision to carry GSN on a broader tier. . . . Yet, Cablevision’s motion is devoid of any discussion of these factors.”).

²¹ Motion at 17.

²² Opposition at 12.

²³ HDO, 27 FCC Rcd at 5136 ¶ 36.

²⁴ *Id.* at 5136 ¶ 39.

²⁵ *Summary Decision*, 34 FCC 2d at 488 n.3 (“Assuming that the basic facts are conceded (A did X to B, for example), expert or character testimony may still be appropriate to determine whether A was acting in accordance with accepted industry or community practices, was acting in good faith, or for base or worthy motives. In such circumstances, summary decision of the basic facts would be appropriate, but a hearing on the inferences to be drawn from them or as to the ultimate findings of facts would also be appropriate.”).

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9. Obviously, summary decision is not a procedure that was intended to be used in resolving these complex issues of mixed law and fact. The Presiding Judge thus concludes that Cablevision has not demonstrated that there are no uncontested material and triable facts. Therefore, the prerequisite finding that “there is no genuine issue of material fact” for issuance of a summary decision on the ultimate issues set for hearing, in lieu of the scheduled evidentiary hearing on GSN’s program carriage complaint, cannot be made.²⁶

RULING

10. Accordingly, for the foregoing reasons, IT IS ORDERED that the Motion for Summary Decision that was filed by Cablevision Systems Corporation on April 29, 2015, fails to meet the standards of Section 1.251 of the Commission’s Rules and therefore **IS DENIED**.

FEDERAL COMMUNICATIONS COMMISSION²⁷

A handwritten signature in black ink, reading "Richard L. Sippel". The signature is written in a cursive, flowing style.

Richard L. Sippel
Chief Administrative Law Judge

²⁶ 47 C.F.R. § 1.251(a)(1).

²⁷ Courtesy copies sent to counsel *via* email on date of issuance.